IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 161 of 1999

And

CRIMINAL APPEAL No 262 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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ASHOK GANPATBHAI

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Appeal No. 161 of 1999
MR JM BUDDHBHATTI for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
MR ND GOHIL, APP for Respondent No. 1

2. Criminal Appeal No. 262 of 1999
MR ND GOHIL, APP for Petitioner No. 1
MR JM BUDDHBHATTI for Respondent No. 1

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CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 27/06/2003

COMMON ORAL JUDGEMENT
(Per : MR.JUSTICE N.G.NANDI)

1. These Criminal Appeals arise out of the judgment & order dated 30-12-1998 rendered by Learned Addl. Sessions Judge, Ahmedabad (Rural) at Gandhinagar in Sessions Case No. 7 of 1998, whereby the original accused Ashokkumar Ganpatlal Tapodhan (appellant in Criminal Appeal No. 161 of 1999) came to be convicted and sentenced to suffer 5 years R.I. and fine of Rs.1000/-; in default 2 months R.I. for the offence under section 307 of I.P. Code. The State has preferred Criminal Appeal No. 262 of 1999 for enhancement of the sentence imposed on the convict (appellant in Criminal Appeal No. 161 of 1999)

2. The prosecution case shortly stated is, that complainant Shaileshkumar Nanjibhai Dabhi and Ashokbhai happened to be the friends, staying in the neighbourhood of each other; that on 27-8-1997 in the noon time Ashokbhai went to Shaileshkumar and told him to accompany him to village Randheja; whereupon at about 2.30 in the noon both left for Randheja. At Randheja, both stayed overnight at the house of maternal uncle of Ashokbhai; that Ashokbhai told Shaileshkumar that in the morning he has to open the shop and therefore they will be required to go in the early morning; thereafter both of them got up early in the morning and at about 4.00 O' clock left Randheja for going to Ahmedabad; that on foot they came to Randheja cross roads and they were passing from near a petrol pump. At that time Ashokbhai suddenly caught hold of Shaileshkumar and felled him down, took out knife from his pocket and started giving knife blows in the stomach region of Shaileshkumar. Cries were raised but Ashokbhai dealt successive knife blows one after another on the person of Shaileshkumar; that 5 blows on the right hand, 3 blows on the left, 2 blows on the stomach, besides the blows on left leg knee, right thigh etc were dealt. In all 23 blows were given with the knife; that thereafter Ashokbhai fled away from the place of incident; that one police constable who happened to pass from near the place of incident saw the injured and in a motor truck the

injured was sent to Pethapur Police Station. From Pethapur police station the injured was brought to Civil Hospital, Gandhinagar. From Civil Hospital, Gandhinagar yadi/entry was also sent to Pethapur police station. The injured Shaileshkumar gave his complaint in Civil Hospital, Gandhinagar. The offence was registered against the accused Ashokbhai and the investigation started.

On completion of investigation chargesheet was filed against the accused. On the basis of the material available charge was framed against the accused person. The accused denied the charge levelled again him and claimed to be tried. Learned Trial Judge, appreciating the oral as well as documentary evidence and the statement u/s 313 Criminal Procedure Code, found the accused guilty for the offence under section 307 I.P.Code and sentenced the accused as aforestated. It is this finding of guilt and sentence imposed for the offence under section 307 I.P. Code which is challenged by the appellant-convict in Criminal Appeal No. 161 of 1999. Whereas the State feeling aggrieved with the sentence imposed has preferred Criminal Appeal No. 262 of 1999 for enhancement of the sentence imposed on the convict by the trial court.

We have heard the submissions advanced by Mr. J.M. Budhabhati learned advocate for the appellant convict and Mr. N.D. Gohil, learned APP for the respondent State in both these appeals.

3. It may be noted at the outset that it is not in dispute that the accused and the complainant were friends and knew each other much prior to the incident. It is also not disputed that on 27-8-1997 accused and the complainant came to village Randheja and both stayed overnight at Randheja at the place of uncle of the accused. It is also an admitted position that accused and complainant left Randheja in the early hours of 28-8-1997 and they were coming on foot and had reached Randheja crossing. It is also admitted that at that place, complainant Shaileshkumar received injuries and fell down and that the accused ran away from that place.

4. The evidence of P.W. 3 Laxmiben Nanjibhai Dabhi, mother of the injured has in clear terms stated that on 27-8-1997 at about 2.30 p.m. accused had come to her house and her son Shaileshkumar accompanied the accused for going to Randheja; that while going she was told by both that they would not be returning in the evening and they would stay overnight at Randheja. The evidence of

P.W-5 Chandubhai Vastabhai Shrimali, cousin brother of the accused suggests that before 15 - 16 months accused Ashokbhai had come with his friend to Narsibhai Chaganbhai, uncle of the witness and therefrom accused and his friend had come to the house of the witness and they had stayed overnight at the house of the witness. He has no idea as to when the accused and his friend left during night. Thus the evidence of P.W-3 and P.W-5 also clearly suggest that the complainant and the accused went to village Randheja and stayed overnight at Randheja and left Randheja in the early hours of 28-8-1997.

5. Complainant Shaileshkumar in his evidence exhibit-18 has deposed that at the time of incident he and the accused were alone, which fact is also borne out from the further statement of the accused under section 313 of Cr.P.C. It is further deposed that the incident took place on the road leading from Randheja to Gandhinagar; that at a little distance from the place of incident there was Gunghat Hotel and there was no traffic on the road at that time. It is further deposed that the witness and the accused happened to be the friends. On the request of the accused on 27-8-1997 both came to village Randheja, stayed overnight at Randheja at the place of P.W. 5 Chandubhai Shrimali, cousin brother of the accused, which fact as pointed out above is also suggested from the evidence of P.W-5. It is also suggested that at the instance of the accused both left Randheja in the early morning of 28-8-1997 and had reached Randheja crossing on foot. The evidence of P.W-5 also suggests that accused and his friend left during the night hours which also corroborates the say of the complainant that they left Randheja in the early morning. It is further stated from the evidence of the complainant that after walking considerable distance he asked the accused as to how long they have to walk, whereupon the accused got enraged and started giving abuses to the complainant. The witness told him not to give abuses which further enraged the accused and the accused took out knife which he was having with him and started giving knife blows to the complainant. It is deposed that successive blows were dealt with knife by the accused. That 6 blows were dealt on right hand, 2 blows below left hand elbow and on left side portion, and below the chest 4-5 blows were dealt; that on right hand side of the stomach 4 blows were dealt, that 2 blows were also given on the right thigh, that one blow below the rib in the chest was also given and one blow below the right knee was also dealt; that complainant started bleeding and fell down at the place of incident. Seeing the complainant in the pool of blood the accused ran away.

Nothing substantial has been brought out in the cross examination of the complainant so as to discredit the testimony of the complainant on the incident of accused having dealt knife blows on the person of the complainant.

6. In order to prove the injuries in the incident on the complainant the prosecution has examined P.W-2 Dr. Ritaben Pravinchandra Shah, who was working as Medical Officer in Civil Hospital, Ahmedabad. It is suggested from her evidence that on 28-8-1997 she was working as Casualty Medical Officer and at about 10.40 a.m. complainant Shaileshkumar Nanjibhai Dabhi was examined by her who had come on transfer chit from Gandhinagar Civil Hospital. It is further deposed that the injured gave history of assault with knife at about 4.00 O' clock in the early morning. 23 external injuries were found on the person of the injured during the medical examination. Injury No. 1 to 7 are incise wounds on the chest and stomach region, injury no. 8 to 21 and 23 are on left thigh, right thigh, left knee, right hand and left upper thigh , whereas injury no. 22 was a stab wound on left lower flank. It is further deposed by P.W-2 that the patient was admitted as an indoor patient and was discharged from the hospital on 5-9-1997. It is deposed that the injuries found on the person of the injured were capable of being caused by a sharp cutting weapon like knife, muddamal article no.11. It is stated that with this knife the injuries found on the injured could be caused; that the injury no. 7 stab wound over left upper abdomen and injury no. 22 on left lower flank were deep injures and both these injuries were penetrating wounds because of which peritoneum was perforated and thus both these injures were peritoneum deep and because of these injuries there was possibility of occurring death. That the remaining injuries were not deep and they were not going up to cavity. In the cross examination it is deposed that when witness examined the injured he was fully conscious; that the witness issued injury certificate Exh. 22, wherein it is not mentioned that the injury no. 7 and 22 were muscle deep , that injury no. 8 to 21 and injury no.23 were superficial injuries, that all these injuries can be caused with sharp edge portion of muddamal knife; that even if complication does not take place, because of injury no. 7 and 22, death can occur.

Thus it be seen from the evidence of P.W-3 that because of injuries no. 7 & 22 death could have occurred and these injuries were capable of being caused with knife, muddamal article no. 11. It is suggested from

the evidence that all these injuries were inflicted from the front side. The injuries were caused from the front and from very short distance. Under the circumstances there can be no mistake in the identity in as much as the evidence disclosed that there were only 2 persons, namely the injured and the accused at the place of incident, and as suggested from the evidence only the injured and the accused were going together at the relevant time when the incident took place. It is not the say of the accused nor suggested from the evidence that there was any enmity between the complainant and the accused and there could be no reason for the complainant to falsely implicate the accused when he regarded the accused as his elder brother and respected him as such as suggested from the evidence on record.

7. Some suggestions have been made to the complainant during cross examination so as to suggest that the injuries caused to the complainant were in self defence of the accused. The complainant has denied the suggestion that he was tired because of the early rising and exertion and was sleeping while walking. It is also denied that from behind he had caught hold of the accused by his neck and assaulted the accused with knife. It is also denied that holding the accused by neck from his behind he had attempted to give knife blow. It is also denied that because of sudden attack the accused was stunned and accused held the hands of the witness for taking away the knife from him. It is also denied that in the process of snatching the knife from the hands of the witness, the accused sustained knife injury in his palm. It is also denied that as the knife was tried to be taken away, the witness sustained knife injuries on both the hands. It is denied that after considerable attempts the accused succeeded in getting away knife from the hands of the witness. It is denied that the witness gave kicks with his legs to the accused. It is denied that in the process he sustained knife injuries on the legs. It is also denied that after the witness caught hold of the accused by his neck the accused started feeling suffocated and tried to free himself and in the process he gave knife blows in side portion of the abdomen. It is also denied that as the grip of the witness had loosened the accused ran away.

It is pertinent to note that the accused in his further statement has not said a word about the injuries caused with knife to the complainant was under the circumstances suggested to the complainant during cross examination as pointed out above. It is pertinent to note that accused did not tell P.W-7 Arvind Valjibhai

Tapodhan who happens to be the uncle of the accused about the incident as suggested to P.W-1. P.W-7 Arvindbhai in his evidence has said that the accused is his cousin and accused had told the witness that he (accused) and his friend had gone to Randheja at the place of his maternal uncle where they had stayed overnight; that on the way 3 persons had met them, there was scuffle with them and in the palm the accused has sustained injury. So saying the accused showed the injury caused to him. That the accused had also told the witness that the person who was with him has been injured with knife by those assailants and that the witness should go and inquire about that person whether he is on the road or not. Thereafter the witness came to the place of incident to inquire about the injured, but the injured was not found and the witness returned. This witness further states that he had told the accused that nobody is there and thereafter the accused left saying that he is going to Ahmedabad. Thus it would be seen from the evidence of P.W-7 that accused does not tell P.W-7 about the injuries caused to him was in self defence. On the contrary what is told to P.W-7 is that some 3 persons met the accused and the complainant on the way and there was scuffle with them and accused sustained injury in the palm, whereas the other person (complainant) was injured with knife by those 3 persons. This is with a view to appreciate the suggestions put to the complainant witness and to the injuries caused to the complainant stated to be in self defence by the accused.

As it is pertinent to note that even in the further statement under section 313 of Cr.P.C. the accused has not said a word about the injuries caused to the complainant are in self defence. All these would belie the say of the accused as regards the injuries caused to the complainant to be in self defence. At the same time though the accused has in his further statement said that seeing the complainant with injuries in pool of blood, he ran away from the place of incident is not explained in his further statement as to when both of them were walking together, how the complainant sustained injuries and how he fell down and why he ran away from the place of incident. In our opinion the accused has not explained the circumstances incriminating against him emerging from the prosecution evidence in his further statement.

The suggestions put to the complainant during cross examination as pointed out above and what has been told to P.W-7 as referred to above, does not inspire any confidence in holding that the injuries caused to the

complainant were in self defence by the accused as suggested to the complainant.

8. It is pertinent to note that the evidence of P.W-2 and the injury certificate exhibit-22 suggests that injury no.1 is a stab wound on the lower chest on mid line, whereas injury no.2 is a stab wound near left lower chest near midline. Injury no.3 is a stab wound over right hypochondria region, whereas injury No. 4 is over right hypochondria lateral side. Injury no. 5 is stab wound over left lower chest, injury no. 6 is stab wound over left upper abdomen, injury no. 7 is stab wound over left upper abdomen. Injury no.22 is stab wound on left lower flank with other injuries on thigh, knee, elbow etc. If at all the injuries in self defence were required to be inflicted, whether as many as 23 successive blows of knife were required, that too on the vital parts of the body as indicated by the evidence of P.W-2 and injury certificate exh.22. As far as injury found on the person of the accused is concerned, it has been suggested from the evidence that he gave complaint against the injured with a history of the complainant having inflicted knife blow. Defence witness Dr. Dinesh Savjibhai Chandana in his evidence exh. 45 has deposed that in the palm of the complainant/accused there was an incise wound for which certificate exh. 46 was given. The defence witness also suggests that if the patient holding the knife in his hand is inflicting injury on the other person at that time in the scuffle if the palm comes in contact of the edged portion then also such injury is possible. The injury on the person of the accused does not in any manner suggest his innocence. On the contrary it provides evidence to suggest the presence and involvement of the accused in the occurrence.

9. Exhibit-31 is the panchnama pertaining to place of incident. It is suggested therefrom that sample of the soil was taken from the place of incident and sent for analysis to the Forensic Science Laboratory. Serological analysis report of FSL exh. 41 suggests that the trial sample of the soil recovered from the place of incident had human blood of AB group. The clothes of the injured were recovered vide panchnama exh. 24 proved by the evidence of panchas. The blood marks found on the clothes of the injured are of AB group as per the report exh. 41. Thus the human blood found at the place of incident and the human blood on the clothes of the injured had the same blood group i.e. human blood of AB group. The report of the FSL at exh. 39 at page 143 contains opinion about the cut marks on the clothes of the injured tallies with the muddamal knife. Perusal of

the same suggests that article no.3 open shirt, article no.4 banian and article no.5 pant had the cut marks which could be by article no. 11 (knife) which would show that the cut marks on the clothes of the injured were by muddamal article no.11 with which the injuries could be caused. Evidence of P.W-8 Police Constable Kanubhai Bababhai Parmar exh. 34 suggests that on 28-8-1997 he was on leave and was going to Vasaniya Mahadev for darshan on scooter at Gandhinagar; that when he had reached near Gunghat Hotel where he found one person in injured condition lying on the road; that the witness asked the injured as to what had happened and the injured replied saying his friend has inflicted knife injuries; that the witness asked as to who has injured him but the injured was not in a position to speak more; that thereafter the injured was sent to Pethapur police station in a private truck. Thus it is suggested that the complainant was lying in the injured condition wherefrom he was sent to Pethapur police station by P.W-8. Sample of the soil was recovered vide panchnama exh.31 form this very place and at the time of incident only the injured and the accused were at the place of incident also establishes the involvement of the accused in the incident causing knife injuries to the complainant.

10. It is the say of the prosecution that knife muddamal article no. 11 was discovered by the accused. In this regard the evidence of P.W-7 Arvindbhai Valjibhai Tapodhan exh. 33 suggests that police on the next day of the incident took the accused to the house of this witness and told him that the accused has concealed the knife in the house of the witness whereupon the witness expressed his ignorance to the same; that the police had taken out the knife from the shelf where the accused had concealed the same and took away that knife from the house of the witness. In the cross examination it has been stated by the witness that the witness did not recover the knife, that the accused and the police person had gone in the rear room and the knife was discovered. Evidence of P.W-6 Jitendrasinh Shivsinh Waghela exh. 30 proves the discovery of the knife by the accused vide panchnama exh. 32 which fact is also corroborated by evidence of P.W-7 as pointed out above. Exh. 41 suggests human blood on muddamal knife, but the blood group could not be ascertained. But that will not make any difference as far as the involvement of the accused in the incident is concerned, in view of the evidence as discussed above.

11. Thus it would be seen from the above that the

prosecution has been able to bring the guilt home to the accused by satisfactory and reliable evidence and it is established that the accused inflicted knife blows with a dangerous weapon like knife muddamal knife article 11. As pointed out above, there were as many as 23 successive blows dealt on the complainant. 8 of them are on the vital parts, i.e. injury no. 1 to 7 and no. 22 . As observed earlier all these injures cannot be regarded as in self-defence of the accused for the reasons aforestated and the injuries caused to the complainant are voluntary injuries caused to the injured. Injury No. 7 & 22 are penetrating wounds which led to perforation of penatoreum and they are peratorial deep and as deposed by P.W-2 because of these two injuries there were possibility of causing death of the injured. Thus the prosecution evidence clearly suggests that these injuries were caused voluntarily by the accused with the knowledge and intention. Under such circumstances, if he (accused) by that act causes death he would be guilty of murder. It may also be noted that the evidence does not disclose that the injured instigated the accused in any manner at the time of incident but it appears that questions put by the injured as pointed out above led the accused to inflict knife blows on the injured.

12. Under the circumstances, we are of the opinion that the prosecution has established the guilt beyond reasonable doubt and the accused has been justifiably held guilty for the offence under section 307 I.P. Code and the conviction recorded against the accused and the sentence imposed do not call for any interference in the appeal preferred by the appellant. The conviction recorded and the sentence imposed by the trial Court are therefore upheld and confirmed.

13. Criminal Appeal No. 262 of 1999 is preferred by the State for the enhancement of the substantive sentence imposed on the respondent by the trial court. As pointed out earlier, the accused has been sentenced to suffer 5 years R.I. and fine of Rs.1000/-, in default, 2 months R.I. for the offence under section 307 I.P. Code. It need hardly be said that the sentence to be imposed on a person for committing the offence has to be commensurate with the gravity of the offence, having regard to the attaining facts & circumstances. The sentence to be imposed on the person found guilty of the offence charged should neither be too lenient nor too harsh. In the instant case the complainant and the accused are friends and at the instance of the accused the complainant went to Randheja and stayed with him overnight at Randheja at

the place of maternal uncle of the accused and while they were returning in the early morning the incident took place. It is stated by Mr. Buddhabhati learned advocate for the convict that the sentence imposed by the trial court does not call for any interference. Mr. N.D. Gohil,learned APP has placed on record the Jail Report which suggests that the convict has been released from jail on 1-11-2001, having served out the sentence with the remission and set off admissible to him.

14. Having regard to the facts & circumstances and gravity of the offence, we do not regard the substantive sentence and the fine imposed by the trial court deserve any interference in the appeal, as this is not a fit case for enhancement of the sentence and therefore the appeal would be liable to be dismissed as no enhancement in the sentence imposed by the trial court is called for.

15. In the result, both the appeals fail and dismissed accordingly.

Dt: 27-6-2003 ( N.G. Nandi, J )

( Ravi R. Tripathi, J )

/vgn